

12-15-1984

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### Recommended Citation

Arthur Gilbert and William Gorenfeld *The Constitution Should Protect Everyone - Even Lawyers*, 12 Pepp. L. Rev. 1 (1985)  
Available at: <http://digitalcommons.pepperdine.edu/plr/vol12/iss1/2>

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# The Constitution Should Protect Everyone—Even Lawyers

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AND  
WILLIAM GORENFELD\*\*

This comment explores the conscription of lawyers to represent indigent defendants in civil actions initiated by the state. A good starting point is that “[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”<sup>1</sup> The United States Supreme Court has held that “[t]he Constitution of the United States was designed for the common and equal benefit of all the people of the United States”<sup>2</sup> and was to favor “no racial group, no political or social group.”<sup>3</sup>

Should these notions of protection for “all classes of men” apply when the class is composed of lawyers? Of course it should, as would argue most lawyers, many of whom have been concerned about protecting the constitutional rights of their clients, but who are now concerned about their own constitutional rights,

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† Justice Gilbert wishes to gratefully acknowledge the editorial assistance of Dorothy Kray, Research Attorney, Court of Appeal, Division 6, Second District, and Dana Parks, student extern from Boalt Hall, University of California.

1. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866).

2. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) (recognizing the jurisdiction of the United States Supreme Court extends to any case which questions the validity of a treaty, or statute of, or an authority exercised under that of the United States).

3. *Uphaus v. Wyman*, 364 U.S. 388, 406 (1960) (Douglas, J., dissenting).

as well. They may be worried because the legal profession is one of the most maligned in the world. Will Rogers, for example, once commented that, "[p]ersonally, I don't think that you can make a lawyer honest by an act of the legislature. You've got to work on his conscience—and his lack of conscience is what makes him a lawyer."<sup>4</sup> On occasion, criticism comes from those within its own ranks. "I think the legal profession, as a whole, presents a very sad spectacle. I fear that it has become so legalized and commercialized in its higher strata and has so little professional and public spirit throughout that it is lagging behind the other professions."<sup>5</sup>

To depict the problem of mandatory attorney representation without compensation, a hypothetical case will be used based on California law. A brief summary will reflect the views for requiring free legal services to defendants in civil cases. After developing this foundation, there will be an analysis of the equal protection rights of the attorney. Finally, there will be a discussion of the impact of a failure to resolve this issue.

## I. A HYPOTHETICAL CASE

A lawyer's confrontation with the Constitution may come about fortuitously. The following scenario provides an example of how the rights of the client and the lawyer may come to an impasse. Let us assume that a county in California files a civil action against a defendant, named Gloucester,<sup>6</sup> to establish his paternity of a minor child, and to require him to pay child support under California's Welfare and Institutions Code.<sup>7</sup>

The county is motivated to file this action because California requires that as a condition of receiving Aid to Families with Dependent Children (AFDC) benefits,<sup>8</sup> a parent assigns to the

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4. B. STERLING, *THE BEST OF WILL ROGERS* 213 (Crown Publishing 1979).

5. H. F. STONE, *PILLAR OF THE LAW*, ALPHEUS THOMAS MASON (Viking Press 1956).

6. See W. SHAKESPEARE, *THE TRAGEDY OF KING LEAR*.

7. CAL. WELF. & INST. CODE § 11350 (West 1980). This code section requires noncustodial parents to reimburse the county for any public assistance provided to their children unless that parent is properly paying his court-ordered support payments. In *County of Ventura v. Tillett*, 133 Cal. App. 3d 105, 114, 183 Cal. Rptr. 741, 747 (1982), *cert. denied*, 460 U.S. 1061 (1983), the court of appeal held that an indigent defendant who is prosecuted by the district attorney for failure to pay child support is constitutionally entitled to the appointment of free legal counsel to represent him. See *Salas v. Cortez*, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529, *cert. denied*, 444 U.S. 900 (1979).

8. In 1974, Congress amended the Social Security Act because the welfare rolls reflected that a significant number of children participating in the AFDC program were not supported by their absent parents. Note, *Child Support Enforcement and Establishment of Paternity as Tools of Welfare Reform*, 52 WASH. L. REV. 169, 170-72 (1976). This article provides a comprehensive discussion of the state re-

county his or her right to child support from the absent parent and agrees to assist in proving the paternity of any illegitimate children for whom aid is claimed.<sup>9</sup>

Defendant Gloucester claims indigency and moves to have the court appoint counsel to represent him. In criminal cases, indigents are entitled to legal representation.<sup>10</sup> In California, the public defender provides representation for indigents charged with *criminal* offenses.<sup>11</sup> When the public defender has a conflict, then a private attorney is chosen by the court to represent the defendant. This attorney is paid for his services by funds allocated by the Board of Supervisors of the particular county involved.<sup>12</sup>

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quirements under the congressional scheme. Congressional studies also established that "the largest single factor accounting for the increase in the AFDC rolls is illegitimacy." *Id.* at 170 n.19 (citation omitted). Consequently, state and federal legislation was enacted to require absent parents of children receiving AFDC to repay all—or at least a portion—of the public funds expended to support their children. *Salas v. Cortez*, 24 Cal. 3d 22, 29-32, 593 P.2d 226, 231-33, 154 Cal. Rptr. 529, 534-36, *cert. denied*, 444 U.S. 900 (1979).

9. CAL. WELF. & INST. CODE § 11477 (West Supp. 1984).

As a condition of eligibility for aid paid under this chapter, each applicant or recipient shall:

(a) Assign to the county any rights to support from any other person such applicant may have in their own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and which have accrued at the time such assignment is made. Receipt of public assistance under this chapter shall operate as an assignment by operation of law.

*Id.*

10. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing the constitutional right of an indigent to have representation by counsel during a trial for non-capital felonies).

11. CAL. GOV'T CODE § 27706 (West Supp. 1984). This statute not only requires the public defender to represent indigent criminal defendants, but also requires the public defender to act as counsel in some forms of civil actions. If requested, the public defender must prosecute actions for: the collection of wages (if under \$100); any civil case where the defendant is being persecuted or harassed; any action under Division 4 of the Probate Code and Part 1 of Division 5 of the Welfare and Institutions Code; any action under Chapter 2 of Part 1 of Division 2 of the Welfare and Institutions Code and any action under section 6861 of the Penal Code. The public defender may act as counsel in other actions arising from criminal or juvenile proceedings where the party may be punished by detention.

12. CAL. PENAL CODE § 987.2 (West Supp. 1984) states in part:

(a) In any case in which a person, including a person who is a minor, desires but is unable to employ counsel and in which counsel is assigned in the superior court, municipal court, or justice court to represent such a person in a criminal trial, proceeding or appeal, such counsel, in a county or city and county in which there is no public defender, or in a case in which the court finds that because of conflict of interest or other reasons the public defender has properly refused to represent the person accused, shall receive a reasonable sum for compensation and for necessary ex-

But Gloucester is being sued in a *civil* action. In certain civil actions an indigent defendant is entitled to representation.<sup>13</sup> In *Payne v. Superior Court*,<sup>14</sup> the California Supreme Court held that an indigent, incarcerated defendant who is sued civilly has a constitutional right to representation. In *Salas v. Cortez*,<sup>15</sup> the California Supreme Court held that an indigent defendant in a paternity suit filed by the state is entitled to appointed counsel. When Gloucester requests appointed counsel, the trial court faces a dilemma—whom to appoint? *Salas* left open the intriguing question of how to recruit such counsel.<sup>16</sup> The trial court wants to accommodate Gloucester as soon as possible, but who is in sight?

## II. A QUEST FOR REPRESENTATION

The court might look to either public defenders or to attorneys from the public sector to find representation for defendants in civil litigation.

### A. Public Defender

May the court appoint the public defender?<sup>17</sup> Government

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penses, the amount of which shall be determined by the court, to be paid out of the general fund of the county.

(b) The sum provided for in subdivision (a) may be determined by contract between the court and . . . attorneys after consultation with the [county] board of supervisors as to the total amount of compensation and expenses to be paid, which shall be within the amount of funds allocated by the board . . . for the cost of assigned counsel in such cases.

13. For example, indigent parents are entitled to the appointment of counsel when the right to custody and care of their children is at issue. *See, e.g., In re Jacqueline H.*, 21 Cal. 3d 170, 175-76, 577 P.2d 683, 686-87, 145 Cal. Rptr. 548, 551-52 (1978) (appeal from proceedings to terminate parental rights).

It has been persuasively argued that the poor have both a common law and constitutional right to counsel in all civil cases. *See, e.g., Johnson & Schwartz, Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants, The Legal Arguments*, 11 LOY. L.A.L. REV. 249 (1978) [hereinafter cited as Johnson & Schwartz]; Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651 (1981); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966); Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J.L. REF. 554 (1976); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967).

14. *Payne v. Superior Court*, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976) (Payne had been convicted of receiving the stolen property of a competitor. He was jailed, and prior to his release from jail his competitor filed a civil complaint seeking damages for conversion. Payne's attorney sought to be relieved as counsel due to the likelihood that he would not be paid. Consequently, a default judgment on the civil complaint was entered against Payne since he could neither appear on his own behalf or hire counsel to represent him).

15. 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 539, *cert. denied*, 444 U.S. 900 (1979).

16. *Id.*

17. *See infra* notes 18-21 and accompanying text.

Code section 27706 outlines the duties of a public defender.<sup>18</sup> These duties include providing representation for indigents charged with contempt or criminal offenses, and providing representation in certain specified civil actions.<sup>19</sup> In the absence of statutory authorization, the court has no jurisdiction to compel public defenders to serve in any capacity other than those enumerated.<sup>20</sup> Since this section does not authorize the appointment of public defenders in civil support and paternity actions, the court may not appoint public defenders to assume this task.<sup>21</sup>

### *B. The Private Sector*

The trial court must therefore look to the private sector. In recent years it has not been a great problem recruiting attorneys in criminal cases in California. These attorneys know they will be compensated. There may not, however, be hordes of altruistic attorneys clamoring to provide representation without compensation to poor defendants in civil matters.

The trial judge may then look to Business and Professions Code section 6068, subdivision (h) which states: "It is the duty of an attorney: . . . (h) Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."<sup>22</sup> Thus armed, the court may waive an admonishing moral finger at attorneys, reminding them that they are duty bound not to reject

18. CAL. GOV'T CODE § 27706 (West Supp. 1984). See *supra* note 11.

19. *Id.* The public defender is authorized to defend any person in a civil action if that person is being persecuted or harassed.

20. See also *Littlefield v. Superior Court*, 98 Cal. App. 3d 652, 160 Cal. Rptr. 175 (1979) (while in some instances the public defender may have the option to represent a defendant if he chooses, CAL. GOV'T CODE § 27706(q), it is clear from this case that the public defender may not be compelled to represent indigents whom they are not statutorily required to represent).

What if the trial court tries to circumvent section 27706 and the *Littlefield* holding by attempting to clothe the public defender in a different suit for purposes of representing Mr. Gloucester? For example, the court may choose to look solely at his status as an attorney. Our supreme court has construed the penal code so that courts "should not encourage imaginative ways to avoid the clear intent of the legislature . . ." *Rhinehart v. Municipal Court*, 35 Cal. 3d 772, 779, 677 P.2d 1206, 1211, 200 Cal. Rptr. 916, 921 (1984).

21. See *supra* note 11. See also *Erwin v. Appellate Dep't*, 146 Cal. App. 3d 715, 194 Cal. Rptr. 328 (1983) (defendant was convicted of numerous misdemeanor charges over a two-year period. In each case the defendant had refused counsel and had appeared in propria persona. The defendant subsequently sought representation by the public defender at the appellate level).

22. CAL. BUS. & PROF. CODE § 6068 (West 1974). See generally Rauch, *Public Interest Law: Should Lawyers Pick Up the Tab?*, 61 A.B.A. J. 453 (1975).

causes of the defenseless or oppressed.<sup>23</sup>

The judge may consider what the court in *Payne v. Superior Court*<sup>24</sup> proposed:

The state also apparently assumes that if this court orders counsel appointed in certain cases, it will mandate that counsel be paid from public funds. We do not assert such power. If and how counsel will be compensated is for the Legislature to decide. Until that body determines that appointed counsel may be compensated from public funds in civil cases, attorneys must serve gratuitously in accordance with their statutory duty not to reject the cause of the defenseless or the oppressed.<sup>25</sup>

Does *Payne* really intend by this dictum, carefully ensconced in a footnote,<sup>26</sup> to give the court the awesome power to force attorneys to work against their will? Does Business and Professions Code section 6068, subdivision (h), a rule of professional conduct, mean to so radically change society?<sup>27</sup> Do not lawyers also have rights?

### III. VIEWS REGARDING COMPULSORY REPRESENTATION TO INDIGENT DEFENDANTS

#### A. Traditional Approach

In theory, all indigent civil litigants were afforded the assistance of free counsel under the common law of England.<sup>28</sup> Thus, some courts have concluded that representation of indigents is traditionally a professional obligation of the bar, which a lawyer undertakes when he becomes a member of the bar.<sup>29</sup>

Some commentators have suggested that this traditional view of the past is inaccurate. In 1980, Harvard law professor David Shapiro examined a number of British and American eighteenth

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23. The legal profession is reminded that "the practice of law is a profession—not a business or skilled trade. While the elements of gain and service are present in both, the difference between a business and a profession is essentially that while the chief end of a trade or business is personal gain, the chief end of a profession is public service." *In re Jacobson*, 240 S.C. 436, 448, 126 S.E.2d 346, 353 (1962).

24. 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976).

25. *Id.* at 920 n.6, 553 P.2d at 574 n.6, 132 Cal. Rptr. at 414 n.6. This view has also been taken in *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984) (indigent parents being prosecuted in a child neglect proceeding); *County of Tulare v. Ybarra*, 143 Cal. App. 3d 580, 192 Cal. Rptr. 49 (1983) (paternity action); *County of Fresno v. Superior Court*, 82 Cal. App. 3d 191, 146 Cal. Rptr. 880 (1978) (defendant was an indigent prisoner in a wrongful death action).

26. See *supra* note 25 and accompanying text.

27. For a comparison of § 6068 and the related obligation of the client to pay his attorney's fee, see Note, *Effect of Attorney's Discharge on Duty to Pay Fee*, 61 CALIF. L. REV. 397 (1973).

28. See also *Johnson & Schwartz, supra* note 13, at 251.

29. *United States v. Dillon*, 346 F.2d 633, 636 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1965); see also *Rowe v. Yuba County*, 17 Cal. 61 (1860).

and nineteenth century cases involving appointment of counsel, and addressed the question of a court's authority to compel an unwilling private attorney to represent an indigent. He concluded:

To justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there. The occasions on which lawyers have given their time and abilities at little or no cost—either on their own initiative or at a court's request—are surely beyond counting. And the sense that doing so is a fulfillment of a high professional aspiration has often been expressed. But the notion that an unwilling lawyer could be forced to serve without fee, though not without its advocates over the centuries, seems never to have found universal acceptance. At least before the latter part of the nineteenth century, that notion is even harder to document in particular instances than it is to support with general pronouncements. . . .<sup>30</sup>

### *B. Modern Perspective*

Luther M. Swygert, Senior Judge, United States Court of Appeals for the Seventh District, in his discussion of the history of the right to counsel in civil cases in England from 1216 to the present, states:

Even if an indigent civil plaintiff gained access to the courts, judges rarely exercised their power to appoint counsel. Aside from the sergeants-at-law, who were officers of the court in the truest sense, there was substantial doubt about a judge's power to compel an unwilling private lawyer to donate his services. While the basis of objections by lawyers to representation of the poor was clearly pecuniary, the failure of the English judiciary to enforce the letter and spirit of the 1495 statute was problematic. Class antagonism may have played some part, but the English trial judges were also concerned about abuses by bad faith claimants and had an understandable opposition to a greatly increased work load.<sup>31</sup>

In 1949, the British government enacted legislation providing funds for legal counsel appointed to represent the poor in civil matters.<sup>32</sup>

The uncompensated impressment of attorneys is occasionally justified on the notion that the practice of law, as distinguished

30. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. Rev. 735, 753 (1980). Professor Shapiro's article goes on to analyze the response of the American courts, the constitutional issues, the economic arguments and concludes that "[a] lawyer who accepts an appointment to render legal services despite personal views or inadequate financial reward will, in all likelihood, be fulfilling the highest aspirations of the profession; a lawyer who refuses to serve without good reason will not." *Id.* at 792.

31. Swygert, *Should Indigent Civil Litigants in Federal Courts Have a Right to Appointed Counsel*, 39 WASH. & LEE L. REV. 1267, 1270-73 (1982) [hereinafter cited as Swygert].

32. *Id.* at 1273.



from other trades, "is a professional privilege conferred by the state, one of the conditions of which is that the attorney not reject 'the cause of the defenseless or the oppressed.' "33

The dictum in *Payne* did not address the constitutional equal protection issue raised by the conscription of attorneys without compensating them. As the late Justice Hopper remarked in his dissent in *County of Fresno v. Superior Court*:<sup>34</sup>

The thrust of the controversy in *Payne* was on the 'right to counsel.' There simply was no written argument on the issue of compensation (and in particular about compensation when legal services were unavailable due to conflicts). The parties in *Payne* just assumed the compensation issue would be resolved as a matter of course. In short, the matter of payment from public funds was never fully briefed, fully argued, or fully considered by the parties.

I cannot agree that the Supreme Court has made a definitive ruling on the subject. The matter is still an open question. In such a situation, an intermediate appellate court should try to bring areas of legal uncertainty to light and sharpen the issues for ultimate consideration by the Supreme Court.<sup>35</sup>

The myth that the court has the power to compel an attorney to provide free legal services was laid to rest in the state of Indiana some 130 years ago in the frequently cited case of *Webb v. Baird*.<sup>36</sup> The Indiana Supreme Court rejected the contention that the bar, being granted special privileges, was under a *noblesse oblige* to provide uncompensated services.<sup>37</sup>

The idea of one calling enjoying peculiar privileges, and therefore being more honorable than any other, is not congenial to our institutions. And that any class should be paid for their particular services in empty honors, is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights.<sup>38</sup>

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33. *County of Fresno v. Superior Court*, 82 Cal. App. 3d 191, 196, 146 Cal. Rptr. 880, 882 (1978).

Certainly the position of an attorney at law in this regard can be distinguished from that of a plumber, a barber, a grocer, a clothing store owner or an automobile dealer. The practice of law is a professional privilege conferred by the state, one of the conditions of which is that the attorney not reject "the cause of the defenseless or the oppressed . . . ."

*Id.* at 196, 146 Cal. Rptr. at 883. See CAL. BUS. & PROF. CODE § 6068(n) (West 1974).

34. 82 Cal. App. 3d at 199, 146 Cal. Rptr. at 885 (Hopper, J., dissenting).

The failure of the supreme court in *Payne* to rule on the issue, due in large part to the inexactitude of the parties briefing the court and arguing the matter, has allowed the decision to forecast an inadequate or incomplete discussion of the law in this area. Reliance on *Payne* in this area is therefore incorrect. *Id.*

35. *Id.*

36. 6 Ind. 13 (1854).

37. *Id.* at 18. "An attorney of the Court is under no obligation, honorary or otherwise, to volunteer his services . . . . It is precisely like providing for the wants of the poor in other respects." *Id.*

38. *Id.* at 16 (an obsolete idea to the judiciary of Indiana in 1954, but not obsolete to the California courts in 1984).

### C. *Changed Conditions*

Today's attorney occupies an even less privileged position than in the past, and thus should not be forced to dispense his services gratuitously. The cost of contributing free legal services may be prohibitive. Recent years have witnessed the removal of a number of obstacles designed by the legal profession to prevent competition.<sup>39</sup>

Although the special preserves of the legal profession have been reduced in recent years, the cost of running a law office has increased. In discussing the venerable case of *Rowe v. Yuba County*,<sup>40</sup> the supreme court held that, in the absence of a statute, an attorney appointed by the court to represent an indigent person is not entitled to compensation. Alternatively, the dissent in *County of Fresno v. Superior Court*<sup>41</sup> contains the following observation:

The attorney at the time of *Rowe* had virtually no overhead. "He did not have to purchase any complicated office equipment. His library expenses were almost nil. He had no staff to pay. Rent was low. There was no such thing as telephone, jet transportation, and all the other enormous expenses that every busy practitioner encounters today."<sup>42</sup>

To make a decent living today, the attorney has to handle a tremendous number of cases—much more than was required at the inception of the rule of *Rowe*. "Furthermore, expanding concepts in law have increased the volume of assignments, the complexity of the issues involved, and a mushrooming of the duties involved in an appointed case."<sup>43</sup>

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39. See, e.g., *Bates and O'Steen v. State Bar*, 433 U.S. 350 (1977) (blanket suppression of attorney advertising not allowed); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, *reh'g denied*, 423 U.S. 886 (1975) (minimum fee schedules violative of section 1 of the Sherman Act); *Jacoby v. State Bar*, 19 Cal. 3d 359, 562 P.2d 1326, 138 Cal. Rptr. 77 (1977) (attorney's statements had constitutionally protected value, although indirectly contrived as possible solicitation; professional advertising was not decided as an issue).

40. *Rowe v. Yuba County*, 17 Cal. 61 (1860).

[I]t is part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the Court, when not inconsistent with their obligations to others; and for compensation, they must trust to the possible future ability of the parties.

*Id.* at 63.

41. 82 Cal. App. 3d 191, 198, 146 Cal. Rptr. 880, 884 (1978) (Hopper, J., dissenting).

42. *Id.* at 202, 146 Cal. Rptr. at 887 (citing Hunter, *Slave Labor in the Courts—A Suggested Solution* 74 CASE & COM. 3, 8 (July-Aug. 1969)).

43. *Id.*

#### D. *The Waning Incentive to Aid Indigents*

At the time that *Payne* was decided, there was a considerable amount of confidence that the newly created Legal Services Corporation would greatly expand its funding of legal aid programs.<sup>44</sup> During the years from 1976-1981, there was a steady growth in the size and vitality of the free legal aid movement. In 1981, the Reagan Administration requested that Congress eliminate funding for the Legal Services Corporation.<sup>45</sup> Congress responded by cutting funding the next fiscal year, 1982, by twenty-five percent.<sup>46</sup> Although there has been some restoration of funding, these programs, even when fully funded, were only able to provide legal assistance to twenty percent of the estimated thirty million poor persons in this country.<sup>47</sup>

#### IV. THE CONSTITUTIONAL DILEMMA—EQUAL PROTECTION VIOLATION

Two constitutional rights are in conflict. On the one hand, indigent defendants are constitutionally entitled to legal counsel in state-initiated paternity actions.<sup>48</sup> On the other hand, it is a denial of equal protection of the law to require a particular class of persons to pay for the cost of this representation.<sup>49</sup>

Article 1, section 7 of the California Constitution provides in pertinent part that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal pro-

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44. 42 U.S.C. §§ 2996 - 2996j (1982). "The Congress finds and declares that—(1) there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances . . . ."

45. 97 L.A. Daily J., Jan. 17, 1984, at 1, col. 2. "The Legal Services Corp. is moving to cut off funding to the Los Angeles-based Western Center on law and poverty . . . . LSC's preliminary determination to deny funds to the programs marks the first such bid by the conservative management installed by President Reagan."

46. See Legal Services Corporation Act Amendments of 1981, Report No. 97-97 to accompany H.R. 3480. "[T]he corporation should be continued . . . but in light of the needs for fiscal restraint, it has reduced its funding level . . . resulting in a 25 percent saving . . . ." *Id.* at 10.

47. See Swygert, *supra* note 31, at 1267.

48. See Johnson & Schwartz, *supra* note 13, at 249. See also *Salas v. Cortez*, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529, *cert. denied*, 444 U.S. 900 (1979).

49. The Code of Professional Responsibility, Ethical Consideration 2-24, impliedly provides that an attorney does not have to represent one who cannot pay. This section specifically states:

A layman whose financial ability is not sufficient to permit payment of any fee *cannot* obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty or the problem or similar factors.

CODE OF PROFESSIONAL RESPONSIBILITY EC 2-24 (emphasis added).

tection of the laws."<sup>50</sup> This provision serves to ensure that the rights of all "persons similarly situated with respect to the legitimate purpose of the law receive like treatment."<sup>51</sup>

The equal protection clause prohibits states from invidiously discriminating between persons or groups.<sup>52</sup> Thus, in applying this provision, one must first identify the class which has been differentiated under the law.<sup>53</sup> The class here consists of lawyers.

To permit the appointment of unwilling counsel to represent indigent defendants such as Mr. Gloucester would be to single out the legal profession as a class to provide free representation to indigents in state-instituted paternity and child support actions. The attorney would, in effect, be forced to give away a portion of his livelihood. As one commentator notes:

It is unfair to put on any working group the burden of providing for the needy out of its stock in trade. No one would suggest that the individual grocer or builder should take the responsibility of providing the food and shelter needed by the poor. The same conclusion applies to the lawyer. The lawyer's stock in trade is intangible—his time fortified by his intellectual and personal qualities, and burdened by his office expenses. To take his stock in trade is like stripping the shelves of the grocer or taking over a subdivision of the builder.<sup>54</sup>

The privilege to practice law is a valuable property right. The right to engage in this vocation, or others, must not be predicated upon the relinquishment of constitutional rights.<sup>55</sup>

Once the class has been identified, the court determines whether the denial of equal protection to this group bears a legitimate state purpose. Under the traditional test, the court determines whether the classification bears a "rational relationship" to a legitimate state purpose.<sup>56</sup> While it is a legitimate state purpose

50. CAL. CONST. art. I, § 7(a).

51. *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 578, 456 P.2d 645, 653, 79 Cal. Rptr. 77, 85 (1969).

52. *Bolling v. Sharpe*, 347 U.S. 497 (1954). See generally Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

53. *Westbrook v. Mihaly*, 2 Cal. 3d 765, 784, 471 P.2d 487, 500, 87 Cal. Rptr. 839, 852 (1970), *vacated on other grounds*, 403 U.S. 915 (1971), *cert. denied*, 403 U.S. 922 (1971).

54. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. REV. 438, 444 (1965). See also *The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression*, 60 KY. L.J. 710, 715 (1972).

55. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963); *In re Marriage of Flaherty*, 31 Cal. 3d 637, 646 P.2d 179, 183 Cal. Rptr. 508 (1982).

56. See generally *Westbrook*, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970), *vacated on other grounds*, 403 U.S. 915 (1971), *cert. denied*, 403 U.S. 922 (1971).

to provide representation for indigent defendants, that goal is frustrated when lawyers are compelled to give free representation. How ironic it would be if in our effort to provide justice to the indigent litigant, we deny it to his attorney. It is a denial of equal protection when the government seeks to charge the cost of operation of a state function conducted for the benefit of the public to a particular class.<sup>57</sup>

## V. IMPACT OF COMPELLED REPRESENTATION—SECOND CLASS REPRESENTATION

In addition to constitutional and historical reasons, there are strong policy considerations that dictate against a program of compelled altruism. The county and state public defender programs were originally created in response to the concern over the shoddy quality of legal services donated to indigent criminal defendants.<sup>58</sup> To compel attorneys to provide representation without compensation in civil cases is to subvert the goal of providing qualified legal representation to the poor in paternity cases. It also creates a nightmare.

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57. See *Department of Mental Hygiene v. Kirchner*, 60 Cal. 2d 716, 722-23, 388 P.2d 700, 724, 36 Cal. Rptr. 488, 492 (1964), *remanded*, 380 U.S. 194; *subsequent op.*, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).

58. *Erwin*, 146 Cal. App. 3d at 719, 94 Cal. Rptr. at 330. See Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. REV. 715 (1961). See also Erwin, *Uncompensated Counsel: They Do Not Meet the Constitutional Mandate*, 49 A.B.A. J. 435 (1963). It was observed 67 years ago that:

The courts do appoint lawyers to defend such persons—but are they really defended? These attorneys serve without compensation, except that in some states a fee is paid in murder cases. . . . On very rare occasions distinguished counsel is assigned to defend a prisoner, but, as a general rule, these assignments go to young and inexperienced attorneys—very often to the practitioner who happens to be in court at the time . . . . The classes of lawyers who are usually assigned to defend, present a phase of this question which cannot be regarded as unimportant. It is a regrettable fact that in nearly all communities (particularly in the larger cities) there is a type of lawyers who are not truly representative of a great profession. Their regard for the rights and liberties of their clients is measured solely from a commercial or financial standpoint. These are more persistent than any other lawyers in their search for clients. Too frequently their services, if rewarded by small fees, are half-hearted or openly negligible. This leaves their clients practically or wholly unprotected. They are commonly referred to as “shysters,” but also described as “snitch lawyers,” “jail lawyers,” “vampires,” “legal vermin,” “harpies” and by other inelegant but extremely emphatic phraseology. They are grasping and mercenary—without character ability or conscience. They prey upon the ignorance or fear of the prisoner, or of his relatives or friends, in their effort to extort a fee. If it be not forthcoming (or often when it is) they advise the prisoner to plead guilty, on the pretext that he will get greater leniency from the court than by standing trial. He may at times go through the forms of a trial, but the defense is perfunctory on its face, and the client pays often for his poverty.

GOLDMAN, *THE PUBLIC DEFENDER* 16, 18-20 (1917).

It is commendable that many lawyers in this state participate in a variety of voluntary pro bono programs.<sup>59</sup> These noble efforts are to be encouraged and with any luck will increase.<sup>60</sup> Forcing lawyers to handle the defense of paternity and child support matters may dampen their enthusiasm to participate in existing pro bono programs. This, of course, would injure these worthwhile programs, many of which are in their infancy and barely surviving on meager resources.

Just as compelled representation without compensation denies the attorney equal protection of the law, it may also deprive the indigent of effective assistance of counsel.<sup>61</sup> In our hypothetical case, for example, an attorney who lacks civil trial experience may be inadvertently appointed by the court to represent Gloucester.<sup>62</sup> Even when an attorney has the requisite experi-

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59. The State Bar of California, Office of Legal Services Voluntary Legal Services Program offers a booklet entitled "Coming to the Aid of Legal Services."

This booklet offers profiles of some local bar pro bono programs to exemplify the variety and scope of ongoing programs throughout the state. The focus in some cases is medium urban, large urban, small to medium rural. The programs profiled are Amicus Publico, Orange County; Fresno County Voluntary Legal Services Program; Napa County Legal Assistance Agency; Pro Bono Publico Program, Riverside County; Public Counsel, Los Angeles County; Public Service Law Corporation, Riverside County; Seniors' Law Project, Kern County; Ventura Free Legal Clinic, Ventura County; Voluntary Legal Services Program, Santa Barbara County.

We also recognize that lawyers as well as others provide financial assistance to public interest law firms such as the Pacific Legal Foundation in Sacramento, and Public Advocates in San Francisco.

Chief Justice Rose Bird of the California Supreme Court said in her 1984 State of the Judiciary Address during the State Bar's annual meeting,

Throughout the state, lawyers are contributing their time, talent, and energy in an amazing variety of ways . . . . They participate in telephone assistance programs. They serve on the boards of directors of nonprofit legal services programs. They work as volunteers in such programs for indigents, immigrants, the handicapped, and others who would otherwise have no access to legal aid. [¶] On both a professional and personal level, lawyers deserve credit for these social contributions, and I think such recognition is long overdue.

60. In the wake of inadequate funding in legal assistance programs, it becomes particularly urgent that members of the bar intensify their efforts to carry a greater portion of the responsibility to provide representation to the poor.

61. See *supra* notes 50-59 and accompanying text.

62. The Code of Professional Responsibility, Disciplinary Rule 6-101 prohibits an attorney from providing services in an area of law in which he is unfamiliar. See also *Lewis v. State Bar*, 28 Cal. 3d 683, 621 P.2d 358, 170 Cal. Rptr. 634 (1981); *Horne v. Peckham*, 97 Cal. App. 3d 404, 414-15, 158 Cal. Rptr. 714, 720 (1979). Consequently, corporate attorneys who are involved in civil litigation would not be appointed to perform this task.

An even more compelling argument is that cases involving parental rights are

ence, there are serious concerns whether such an attorney drafted into providing free services to an indigent may be able to provide the same attention normally provided to a paying client. Every attorney would derive satisfaction from a job done well, but it may be unrealistic for us to expect "satisfaction" to constitute the sole motivation for an attorney to expend the maximum effort. The more conscientiously the attorney fights for the indigent's cause, the greater the financial loss suffered by the attorney.<sup>63</sup> The attorney may also be distracted by concerns over unfinished business at the office on the one hand, and the possible contempt citation hovering in the background on the other.<sup>64</sup>

Some attorneys may find shortcuts particularly seductive. In a close case, an attorney may encourage an indigent defendant to stipulate to judgment. This would effectively avoid the cost and time involved in a full trial. This situation may occur not because the attorney has any evil motive, but only because he may feel it too onerous to proceed with discovery and a full-scale trial in a

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frequently far more complex than usually acknowledged. "Domestic relations litigation [is] one of the most important and sensitive tasks a judge faces . . . ." *In re Marriage of Brantner*, 67 Cal. App. 3d 416, 422, 136 Cal. Rptr. 635, 638 (1977). As the court in *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695 (1984) states:

The stakes in this case are too great not only for the lawyers and court personnel but also for the parents and children involved in neglect cases to let stand a judgment mistakenly entered without any judicial inquiry upon "facts"—that representation of parents in neglect cases entails minimum time and effort and need exact no substantial premium in time or talent from legal advocates—which are widely perceived in the local bar and in the community at large, not to be true, and which have been the core of a decade-old controversy. Such a judicial affirmation made without an adequate inquiry into these facts' truth or falsity would, we fear, invite disrespect of the courts and undermine the credibility of their procedures.

*Id.* at 708-09 (footnote omitted).

63. Hunter, *Slave Labor in the Courts—A Suggested Solution*, 74 CASE & COM. 3, 8-9 (July-Aug. 1969).

An individual practitioner today has overhead that might range from \$10 to \$20 or more for each hour that he is working. If he is called to serve under a court appointment for an indigent defendant, he might be expected to spend 20 to 100 hours. This means that he will have to pay out of his own pocket for the actual work that can be directly attributable to this case anywhere from several hundred dollars to thousands of dollars.

*Id.* at 8.

64. An attorney owes an obligation not only to his client but also to the courts and the justice system not to undertake legal representation in matters unless he has adequate time to pursue the matter with reasonable diligence. When an attorney takes on more than he can properly handle, he jeopardizes both his client's cause and the public interest in sound and efficient administration of justice.

*Lopez v. Larson*, 91 Cal. App. 3d 383, 400, 153 Cal. Rptr. 912, 922 (1979).

What if appointed counsel makes an assessment that his client's position is without merit? Or what happens if the proposed client has a history of complaining about the competency of appointed counsel? Does the existence of these factors permit appointed counsel to withdraw and thereby leave the indigent without representation? See *Bradshaw v. District Court*, 472 F.2d 515 (1984).

case that has a limited chance of success. Conversely, in a marginal case, an attorney might feel compelled to go through a full-scale trial for fear of being accused of giving less than one hundred percent effort for the indigent defendant. An additional motivation may involve the specter of a possible malpractice suit. In either event, the indigent suffers.

It is not suggested that these problems will occur in all cases, but by requiring attorneys to work for nothing, the courts may unwittingly be creating a form of second-class representation. Surely, this is not what the supreme court had in mind when it ruled that paternity and support matters involve issues of constitutional magnitude, thereby mandating the appointment of counsel.<sup>65</sup> It is obvious the supreme court intended indigent defendants to have the benefit of *effective* assistance of counsel.

The court of appeal in *Luke v. County of Los Angeles*<sup>66</sup> stated:

Effective representation today requires counsel experienced in the particular field of law involved. Yet to acquire this experience and maintain an acceptable level of competency in a given field of the law demands continuous study, application and practice. We think the days are past when a lawyer could be expected to do this solely as public service. If society is to demand representation by counsel in an expanding variety of proceedings and to insist on a high level of competency in the performance of such representation, then counsel should be paid. Is it reasonable today to attach to a statute which provides for court-appointed counsel in a custodial proceeding an interpretation that appointed counsel will render his services for nothing?

We think not.<sup>67</sup>

By what method shall the court exercise its discretion in appointing counsel so that the burden will be fairly distributed among members of the bar? Presumably, the court will appoint only competent counsel. Shall this then be a reward for incompetence and a punishment for competence? Are litigation lawyers the only ones to be selected? Shall the struggling sole practitioner bear the same responsibility as the senior partner in a 200-person law firm supported by a lucrative corporate practice?

The problem is further compounded by trying to devise a fair method of selection. If attorneys are to be chosen from a lottery,

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65. *Salas v. Cortez*, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979). "The touchstone of due process is fundamental fairness. Whether due process requires the appointment of counsel in a particular case depends on the interests involved and the nature of the proceedings." *Id.* at 27, 593 P.2d at 229, 154 Cal. Rptr. at 532.

66. 269 Cal. App. 2d 495, 499, 74 Cal. Rptr. 771, 774 (1969).

67. *Id.*



for example, who should be included? Some of the potential nominees that come to mind when conjuring up a list is the following:

- (1) attorneys who live, but do not work in the particular jurisdiction involved;
- (2) attorneys who work in the particular jurisdiction involved, but do not belong to the local bar association;
- (3) attorneys whose offices are located in other judicial districts, but who belong to the local bar association of the particular jurisdiction involved (In addition, there are multitudinous bar associations whose members share such common interests as speciality, ethnicity, geographic location);
- (4) attorneys employed by public agencies other than the public defender (Here the court must bear in mind statutory prohibitions as well as possible conflicts of interest.);
- (5) attorneys licensed to practice law, but who are engaged in other pursuits such as business, teaching or politics;
- (6) attorneys who serve as pro tem judges, or participate in volunteer pro bono programs (Should they be excluded from the lottery? How does one determine the extent of their participation in these programs?).

Others may contemplate even greater *bêtes noires* by adding new combinations and categories to this list.<sup>68</sup>

There must be state-appropriated funds with which to compensate defense counsel in these matters. Constitutional rights are not measured or limited by monetary considerations. "[V]indication of conceded constitutional rights cannot be made dependent upon any fact that it is less expensive to deny than to afford them."<sup>69</sup>

## VI. RESOLVING THE DILEMMA

Earlier, the question was posed of what the court should do when the indigent civil defendant asked for counsel in a state-initiated paternity action. The court should first try to obtain volunteer counsel.<sup>70</sup> This method may not be effective in securing counsel in all cases.

Another coercive method would be to make, as a condition for placement on the list of conflict attorneys<sup>71</sup>, the requirement that an attorney also take a given number of uncompensated cases representing indigent defendants in state-initiated paternity ac-

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68. Formulating a list is analogous to the Lord High Executioner describing his list of potential victims, "whose loss will be a distinct gain to society at large," who concludes that "the task of filling up the blanks I'd rather leave to you, But it really doesn't matter whom you put upon the list, For they'd none of 'em be missed—they'd none of 'em be missed!" W. GILBERT, *THE MIKADO*, Act I.

69. *Watson v. Memphis*, 373 U.S. 526, 538 (1963). See also *Arreola v. Municipal Court*, 139 Cal. App. 3d 108, 113-14, 88 Cal. Rptr. 529, 531 (1983).

70. See *supra* note 64 and accompanying text. *Bradshaw v. District Court of California*, 472 F.2d 515 (1984).

71. A conflict attorney is appointed by the court when the public defender declares a conflict of interest. See also *supra* note 12.

tions. The rationale for this selection is that the conflict attorney is already being compensated. This solution should also be rejected on equal protection grounds. A class of attorneys which has a statutory right to compensation for specific legal services should not have its right to compensation diluted.

The court simply would not be able to proceed with the action unless the county or state provides reasonable compensation for appointed counsel. In such a case, the plaintiff's county will either move the court to dismiss the action without prejudice, or to stay the action until the appointment of counsel is made. What if the plaintiff fails to so move? May the court dismiss the action without prejudice on its own motion? In *County of Tulare v. Ybarra*,<sup>72</sup> the appellate court concluded that there was no authority for the trial court to dismiss a state-instituted paternity action where the alleged father claims indigency and no public funds are available to pay for appointed counsel.

Such authority does exist in those instances where conflicting constitutional issues clash. The inherent powers granted to the trial court by section 128 of the Code of Civil Procedure include the authority to "control its process and orders so as to make them conformable to law and justice."<sup>73</sup> This provision is sufficiently broad so as to give the trial court the power to dismiss state-instituted paternity actions when an indigent defendant's constitutional right to counsel in a state-initiated paternity action is jeopardized.<sup>74</sup>

When the state undertakes to prosecute a paternity or child support action against an indigent, it must bear the expenses necessary to comply with the provisions of the state and federal constitutions. These include, if necessary, the compensation of

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72. 143 Cal. App. 3d 580, 129 Cal. Rptr. 49 (1983).

73. CAL. CIV. PROC. CODE § 128 (West Supp. 1984).

74. Important rights of children as well as the state are involved in the prosecution of paternity actions. *Salas v. Cortez*, 24 Cal. 3d at 33-34, 593 P.2d at 234, 154 Cal. Rptr. at 529. We are not suggesting that insuperable barriers be placed in the way of the state so as to prevent the prosecution of paternity actions against indigent defendants, even though it is unlikely that indigent defendants would be able to pay child support. It must be remembered, however, that lawsuits, whether criminal or civil, are subject to the Constitution. For example, in *County of Los Angeles v. Soto*, 35 Cal. 3d 483, 492 n.4, 674 P.2d 750, 756 n.4, 198 Cal. Rptr. 779, 785 n.4 (1984), the supreme court pointed out that "[e]ven the stability of family relationships, however, cannot outweigh the defendant's right to set aside a judgment entered on the basis of an involuntary waiver of the right to any hearing on the question of paternity." *Id.*

counsel.<sup>75</sup>

## VII. CONCLUSION

Welfare and Institutions Code section 11475 was designed to recoup public funds expended on behalf of AFDC recipients.<sup>76</sup> It is a creature of the legislature. It is therefore incumbent upon the legislature to provide the financial support necessary to meet the requirements that the statute sets. If the state does not wish to appropriate funds sufficient to pay for appointed counsel, should it expect the legal profession to fill this void by subsidizing a cost that should be borne by the tax-paying public?

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75. An effort by the California legislature to provide funding for attorneys appointed to represent indigents in civil matters was vetoed by Governor Deukmejian on September 28, 1984. In his veto message, Governor Deukmejian stated that the bill (S.B. 2057), was an "open-ended appropriation which will be subject to substantial expansion by the court." "Governor Vetoes Funding Bill for Lawyers, Courts," L.A. Daily J., October 1, 1984, at 1, col. 2.

76. CAL. WELF. & INST. CODE § 11475 (West Supp. 1984).